Emas Offshore (M) Sdn Bhd v Suhaimi bin Maryani and another action

HIGH COURT (KUALA LUMPUR) — SUIT NOS 22NCC-473–03 OF 2012 AND 24NCC-84–02 OF 2012
ZALEHA YUSOF J
5 DECEMBER 2012

Companies and Corporations — Shares — Nominee shareholding — Benefit of Bumiputra involvement in operations of company — Defendant not involved in setting up of corporate culture — Defendant never paid for anything with regards to shareholder — Whether defendant held shares on trust for plaintiff's benefit

The plaintiff was an investment holding company based in Singapore and owned by one Ezra Holdings Limited ('Ezra'). The defendant was employed by the Emas Group through Bayu Emas and worked closely with the director of the plaintiff ('PW1'). During the defendant's employment in Bayu Emas, he was privy to a lot of strategic information with regards to the plaintiff's operations. The defendant even suggested that the plaintiff could benefit from bumiputra involvement in the plaintiff's operations in Malaysia. Subsequently, the defendant became the majority shareholder of Genesis, holding 60% shares. Genesis and the plaintiff then entered into a shareholder and joint venture agreement ('JVSA'). Following the JVSA, the defendant was appointed as the director of INTAN and for other companies. However, when the relationship between the plaintiff and defendant turned sour, the former was removed as the director. The plaintiff then entered into a share sale agreement ('SSA') with Perisai Petroleum Bhd ('PERISAI'). Upon discovery of the SSA, the defendant requisitioned for an EGM of Genesis to, inter alia, remove the current directors of Genesis. However, the EGM failed as the directors failed to attend. In the present claim, the plaintiff contended that the defendant was holding the Genesis shares on trust. PW1 testified that it was the defendant who suggested that he be made a nominee and the defendant would hold the shares subject to the interest of the plaintiff. However, the defendant was not involved in the setting up of the corporate culture. The primary issue that arose in the present claim was whether the defendant held the shares on trust for the benefit of the plaintiff.

Held, allowing the claim:

(1) The defendant utilised his position as a shareholder of Genesis to commence a series of actions to interfere, impede and/or jeopardise the conversion of the INTAN preference shares, the termination of the JVSA and as the agreement with Perisai; as a means of retaliation and in an attempt to derail the share sale with Perisai (see para 27).

(2) The defendant himself in evidence had alluded and demonstrated that he was never and neither was he intended to be the beneficial owner of the Genesis shares. He was at all material time holding the shares on trust for the benefit of the plaintiff. His actions and conduct was not consistent with the conduct of a person who claimed to have beneficial interest in the shares. The fact that he never insisted to be a director, never paid for anything with regards to the shareholder, signed all documents that were given to him without question and admitted not to have personal interest; proved without doubt that he was holding the shares on trust for the plaintiff (see para 31).

(3) The defendant had not in any way provided any explanation as to why the plaintiff would allocate the shares in Genesis to him and give him control and rights over vessels in INTAN worth more than US$80m, bearing in mind that DW1 was prior to that an employee of Bayu Emas, a company under the plaintiffs group. It simply does not make sense and it defies any commercial logic and offends equity for the defendant to allege that he was the beneficial owner of the Genesis trust shares (see para 32).

(4) The intention was a matter of evidence and it could be established by way of inference. The trust does not need to be in writing. Based on the testimony of PW1 the trust was an oral trust created between PW1 in his capacity as a director of the plaintiff. In so far as certainty of subject matter, there was no issue as the subject matter is the Genesis shares. In relation to the certainty of object of the trust concerned, there was no dispute that it was to enable the plaintiff to expand and widen its presence and operations in Malaysia (see para 37).

[Bahasa Malaysia summary

Plaintif adalah syarikat pegangan pelaburan yang terletak di Singapura dan dimiliki oleh Ezra Holdings Limited ('Ezra'). Defendan telah diambil bekerja oleh Emas group melalui Bayu Emas dan bekerja rapat dengan pengarah plaintif ('PW1'). Sepanjang pekerjaan defendan di Bayu Emas, dia prihatin terhadap banyak maklumat strategik berkaitan operasi plaintif. Defendan juga telah mencadangkan bahawa plaintif boleh mendapat faedah daripada penglibatan bumiputera dalam operasi plaintif di Malaysia. Berikutan itu, defendan menjadi pemegang saham majoriti Genesis, dengan memegang 60% saham. Genesis dan plaintif telah memasuki satu perjanjian pegangan saham dan usaha sama ('PPSU'). Selepas PPSU itu, defendan telah dilantik sebagai pengarah INTAN dan syarikat-syarikat lain. Walau bagaimanapun, apabila hubungan antara plaintif dan defendan mula retak, defendan telah disingkirkan sebagai pengarah. Plaintif kemudian telah memasuki satu perjanjian jualan saham ('PJS') dengan Perisai Petroleum Bhd ('Perisai'). Setelah mengetahui tentang PJS itu, defendan meminta agar diadakan satu mesyuarat luar biasa ('MLB') Genesis untuk, antara lain, menyingkir

pengarah-pengarah sedia ada Genesis. Walau bagaimanapun, MLB itu telah gagal kerana pengarah-pengarah tersebut gagal untuk hadir. Dalam tuntutan ini, plaintif berhujah bahawa defendan memegang saham Genesis atas amanah. PW1 telah memberi keterangan bahawa defendan yang mencadangkan dia dijadikan penama dan defendan akan memegang saham tersebut tertakluk kepada kepentingan plaintif. Namun begitu, defendan tidak terlibat dalam penetapan budaya korporat itu. Isu utama yang timbul dalam tuntutan ini adalah sama ada defendan memegang saham atas amanah demi kepentingan plaintif.

Diputuskan, membenarkan tuntutan:

(1) Defendan telah menggunakan kedudukannya sebagai pemegang saham Genesis untuk memulakan siri tindakan untuk campur tangan, menghalang dan/atau menjejaskan penukaran saham keutamaan INTAN, penamatan PPSU itu dan berhubung perjanjian dengan Perisai; sebagai cara membalas dendam dan dengan percubaan untuk menggagalkan jualan saham dengan Perisai (lihat perenggan 27).

(2) Defendan sendiri dalam keterangan telah menyebut dan membuktikan bahawa dia tidak pernah dan juga tidak berniat untuk menjadi pemilik benefisiari kepada saham Genesis. Pada setiap masa matan dia memegang saham tersebut atas amanah demi kepentingan plaintif. Tindakan dan perilakunya tidak konsisten dengan perilaku seseorang yang mendakwa mempunyai kepentingan benefisiari dalam saham itu. Bahkan dia tidak pernah mendesak untuk menjadi pengarah, tidak pernah dibayar apa-apa berhubung pemegang saham, menandatangani semua dokumen yang diberikan kepadanya tanpa persoalan dan mengakui tidak mempunyai kepentingan peribadi; membuktikan tanpa keraguan bahawa dia memegang saham atas amanah untuk plaintif (lihat perenggan 31).

(3) Defendan tidak dalam apa cara memberikan apa-apa penjelasan kenapa plainif mengagihkan saham-saham dalam Genesis kepadanya dan memberinya kawalan dan hak ke atas kapal-kapal dalam INTAN bernilai melebihi US$80 juta, dengan mengambil kira bahawa DW1 sebelum ini adalah pekerja Bayu Emas, sebuah syarikat di bawah kumpulan plaintif. Ia tidak masuk akal dan mengatasi apa-apa logik komersial dan menyalahi ekuiti untuk defendan mendakwa bahawa dia merupakan pemilik benefisiari saham amanah Genesis (lihat perenggan 32).

(4) Niat itu satu perkara untuk dibuktikan dan ia boleh dibuktikan melalui campur tangan. Amanah tidak perlu scara bertulis. Berdasarkan testimoni PW1 amanah tersebut merupakan amanah lisan terbentuk antara PW1 dalam kapasitinya sebagai pengarah plaintif. Sejauhmana ketentuan hal perkara itu, tidak menjadi isu kerana hal perkara itu adalah saham Genesi. Berkaitan ketentuan objek amanah yang berkaitan, tiada

pertikaian bahawa ia adalah untuk membolehkan plaintif mengembang dan meluaskan kewujudan dan operasinya di Malaysia (lihat perenggan 37).]

Notes

For a case on nominee shareholding, see 3(1) *Mallal's Digest* (4th Ed, 2011 Reissue) para 960.

Cases referred to

Chempro Technology (M) Sdn Bhd v Wee Eng Hock & 2 Ors [2010] 1 LNS 1857, HC (refd)

ESPL (M) Sdn Bhd v Radio & General Engineering Sdn Bhd [2005] 2 MLJ 422; [2004] 4 CLJ 674, CA (refd)

Tay Choo Foo @ Tay Chiew Foo v Tengku Mohd Saad @ Tengku Arifaad bin Tengku Mansur & Ors (all acting administrators of the estate of Tunku Mansur bin Tunku Yaacob, deceased) and another appeal [2009] 1 MLJ 289; [2009] 2 CLJ 363, CA (refd)

Wan Naimah v Wan Mohamad Nawawai [1974] 1 MLJ 41, FC (refd)

Legislation referred to

Companies Act 1965 Form 32A

Malaysian Merchant Shipping Ordinance 1952 s 11(b)(iv)

Shaikh Abdul Saleem bin Shaikh Abdul Karim (Hafiza bt Johari with him) (Shaikh David Raj) for the plaintiff.

Yusfarizal bin Yusoff (Zulpadli & Edham) for the defendant.

Zaleha Yusof J:

[1] The two actions were heard together and the parties had agreed that the decision in the writ action will bind the originating summons proceedings.

THE PLAINTIFF'S CLAIM

[2] The plaintiff is claiming for the following:

(a) A declaration that 60 shares of Genesis Offshore Sdn Bhd ('Genesis') held by the defendant is at all material times held on trust;

(b) consequently an order for the 60 shares to be transferred back to the plaintiff; and

(c) cost.

A THE DEFENDANT'S DEFENCE

[3] The defendant defence is as follows:

(a) the defendant denies the existence of any such trust;

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(b) the defendant is the legal and beneficial owner of the 60 Genesis shares held in his name based on the intention of parties and proper documentations of Form 32A and Share Certificate;

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(c) furthermore, it is impossible for such a trust to exist for the following reasons:

(i) there was no consideration from the plaintiff;

(ii) it is illegal to own ships registered in Malaysia whilst holding the shares on trust; and

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(iii) even if there was a trust, it was a quistclose trust — the purpose of which was for the ships to be registered in Malaysia, having that purpose fulfilled, the trust is completed and the shares therefore becomes a mere debt.

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BACKGROUND FACTS

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[4] The plaintiff is an investment holding company based in Kuala Lumpur and is owned by Ezra Holdings Limited ('Ezra'), which is based in Singapore and is a public listed company listed on the Singapore Stock Exchange.

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[5] The defendant was employed by the Emas Group since 2003 through Bayu Emas. He worked closely with Adarash Kumar a/l Chranji Lai Amarnath ('Kumar'), PW1 whom he had known since he was a cadet and had worked together with previously in Bumi Armada in Melaka. Kumar is the director of the plaintiff and he was also the person who brought the defendant into the

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plaintiff. Through the recommendation from Kumar, the defendant joined the plaintiff as an operations superintendent in 2003 without even the need of going through an interview process. During the defendant's employment in Bayu Emas and the close working relationship that he had with Kumar, he was privy to a lot of strategic information with regards to the plaintiff's operations.

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The defendant himself admits that during his tenure, he discussed numerous things with Kumar including ways in which the plaintiff could expand their operations in Malaysia further and among the strategies discussed was on how the plaintiff could benefit if they had bumiputra involvement in the plaintiff's operations in Malaysia.

[6] On 22 April 2005, the defendant became the majority shareholder of Genesis, holding its 60% shares. The shareholding of Genesis prior to the involvement of the defendant was as follows:

(a) The plaintiff : 49%
(b) Goh Bee Chean : 51%

[7] These shares were transferred to the defendant for a consideration of RM1 per share via Form 32A as follows:

(a) 49 shares were transferred from the plaintiff to the defendant; and

(b) 11 shares were transferred from Goh Bee Chean to the defendant.

[8] On 28 June 2005, Genesis and the plaintiff entered into a shareholder and joint venture agreement ('JVSA') whereby it was agreed among others:

(a) Genesis and the plaintiff shall have the following shareholdings in the joint venture company:

(i) Genesis shall hold 51%; and

(ii) the plaintiff shall hold 49%;

(b) Intan Offshore Sdn Bhd ('Intan') shall be the joint venture company;

(c) the JVSA will prevail over the Memorandum and Articles of Association of INTAN and should there be any conflict, the shareholders of INTAN shall utilise their voting rights to ensure that, as far as possibly allowed by law, the Memorandum and Articles of Associations of INTAN shall be amended accordingly;

(d) Genesis shall have be entitled to nominate three directors to Intan's Board of Directors whilst Emas shall be entitled to nominate two;

(e) the directors appointed by Genesis are: the plaintiff, the defendant and Cheng Teik Ee and the directors appointed by EMAS are: Lee Chye Tek Lionel and Adarash Kumar a/l Chranji Lai Amamath;

(f) the directors may only be removed or replaced by or at the instance of the party so nominating and appointing them, and the board representatives of the other party shall vote in accordance with the decision of the nominating party;

(g) the JVSA shall be terminated upon the occurrence of an event of default as provided under cl 15 or upon the written consent of all shareholders, or upon the winding up or upon the listing of INTAN;

(h) no parties may sell, transfer, assign or otherwise dispose of any of its shares in INTAN except with the written consent by the other party (if

sold only to related companies) and without first offering to sell to the other party (if sold to the third party); and

(i) the preference shareholder is entitled to convert the shares upon the consent of the other party or upon an event of default.

[9] Intan bought and registered the following vessels in the Malaysia ship registry:

(a)	Lewek Eagle;
(b)	Lewek Emerald;
(c)	Lewek Swift;
(d)	Lewek Mallard;
(e)	Bayu Intan;
(f)	Sarah Gold;
(g)	Sarah Jade; and
(h)	Sarah Pearl

[10] In consideration of some of the purchase of the vessels by Intan, Intan had issued preference shares to the vessels vendor ie the plaintiff. As at 16 May 2011, the plaintiff held 70,637,060 preference shares in Intan. All of Intan's vessels were able to secure long-term contracts with Malaysian oil majors including Petronas. Genesis' business all vests in INTAN.

[11] Following the JVS agreement, the defendant was appointed as a director of Intan on 22 April 2005, Jade Offshore Sdn Bhd ('Jade') on 24 October 2007, Lewek Mallard Offshore Sdn Bhd ('Lewek Mallard') on 10 October 2007, Lewek Eagle Offshore Sdn Bhd ('Lewek Eagle') on 10 October 2007, Bayu Intan Offshore ('Bayu Intan') on 27 November 2007, Sarah Pearl Shipping Pte Ltd ('Sarah Pearl') and Lewek Swift Shipping Pte Ltd ('Lewek Swift') on 15 March 2007.

[12] The relationship of the plaintiff and defendant however turned sour somewhere around 2009. On 23 September 2010, the defendant was removed as a director of Intan. He was also removed as a director of the following companies on the same date:

(a) Jade;

(b) Lewek Eagle;

(c) Lewek Mallard; and

(d) Bayu Intan.

[13] Subsequently, the plaintiff entered into a share sale agreement ('SSA') with Perisai Petroleum Bhd ('PERISAI') whereby it was agreed among others:

(a) the plaintiff shall convert its preference shares in Genesis into ordinary shares;

(b) the plaintiff shall terminate the JV agreement with Genesis;

(c) once the plaintiff has converted the preference shares to ordinary shares, the plaintiff shall sell 51% shares to PERISAI; and

(d) in return, PERISAI shall pay by issuance of its own shares to the plaintiff.

[14] Upon discovering of the SSA, the defendant requisitioned for an EGM of Genesis on 23 March 2011 to remove the current directors of Genesis and to prevent the conversion of the preference shares and termination of the JVSA. The EGM failed as the directors failed to attend, thus the defendant filed this originating summons on 21 June 2011. Goh Bee Chean in her affidavit number one raised the issue that the defendant was holding the Genesis shares on trust. On 29 March 2012, the plaintiff filed this writ action seeking a declaration of the alleged trust.

WITNESSES

[15] Five witnesses were called to give evidence, four for the plaintiffs and one for the defendant. They are as follows:

(a)	Adarash Kumar a/l Chranji Lai Amarnath, a director of the plaintiff	(PW1) (WSPS1);
(b)	Wong Chai Vei, a Director of Genesis	(PW2)
(c)	Chan Eng Yew, Corporative Finance Manager of Ezra	(PW3) (WSPW2);
(d)	Lee Kian Soo, Executive Chairman of Ezra	(PW4) (WSPS3); and
(e)	Suhaimi bin Maryani, the defendant himself	(DW1) (WSDW1) (WSDW1A) (WSDW1B)

ISSUE

[16] Whether the defendant held the Genesis shares on trust for the benefit of the plaintiff?

FINDINGS OF COURT

[17] PW1 had testified that he was the one responsible to bring the defendant into the Emas Group as their relationship was very close and he

regard the defendant not only as employee but an old friend of his as they have known each other for more than 20 years. The fact that they were very close was not denied by the defendant.

[18] According to PW1, it was the defendant who suggested that he be made a nominee and that the defendant will hold the shares subject to the interest of the plaintiff. The formation of trust according to PW1 was done by way of oral discussion between him and the defendant. PW1 said he had managed to convince the management of the plaintiff and Ezra to consider the defendant's proposal to utilise him as a nominee to widen the plaintiff's business in Malaysia.

[19] The Genesis shares were allocated to the defendant without any financial consideration from the defendant. Although Form 32A states that the shares were transferred from a total consideration of RM60, the defendant in his evidence admits that no payment was actually made.

[20] Despite his assertion that he is the beneficial owner of the Genesis shares, the defendant admits that he did not ask to be made a director, nor did he have any say in so far as who the directors of Genesis would be. From the evidence of the witnesses, including the defendant himself, it is clear that the defendant was also not involved in the setting up of the corporate structure.

[21] As submitted by the plaintiff, it is to be noted that all the directors of the plaintiff were persons either nominated by the plaintiff or persons who will not be adverse to the interest of the plaintiff, namely Goh Bee Chean (the chairman of Ezra's relative), her husband Cheng Teik Ee and Wong Chai Vei, an employee of the Emas Group.

[22] PW3 and PW4 in their evidence had confirmed that the decision not to make the defendant a director of Genesis was done on purpose, despite him being allocated majority shareholding in Genesis, ie as a safeguard to the plaintiff and to prevent any interference in the running of Genesis which may have a detrimental effect to the plaintiff.

[23] PW1 had also explained to the court the setting up of Intan via the JVSA and the fact that the funding for the setting up of Intan and the injection of the assets into Intan was done by Ezra and the plaintiff without any funds coming from the defendant. The manner in which the JVSA was structured in particular relating to the preference shares, were safeguard put in place by the plaintiff to protect its interest.

[24] PW1 also informed the incorporation of Benchmark Marina Sdn Bhd ('Benchmark') wherein the initial paid up capital of RM20,000 was paid by the

plaintiff in cash. The defendant was appointed as the managing director of Benchmark and his wife as a senior manager. The shares were issued in the name of the defendant and his wife who held the entirety of the shares on a 60:40 ratio.

[25] The plaintiff paid the defendant's and his wife's salaries in Benchmark, funded its operation and stood as its principal financial supporter. According to PW1, Benchmark has set up mainly because the plaintiff had problem with their agents in the past in terms of collection so the plaintiff was hopeful that Benchmark could act as an agent for the plaintiff's vessels and to expand their business with Petronas. This was achieved when Benchmark successfully secured a license to supply equipment to Petronas.

[26] PW1 explained that the defendant became bitter when the plaintiff and Ezra started negotiation with Perisai Petroleum Teknologi Bhd ('Perisai') and the plaintiff suggested to place another shareholder from Perisai into Benchmark.

[27] The point about Benchmark seemed to me a bit irrelevant at first. But after hearing the evidence of the defendant during cross-examination by learned counsel for the plaintiff, I could see that this was the starting point of the whole episodes, as the defendant admitted during cross-examination that he felt threatened, angry and betrayed with the issue of Perisai. I therefore agree with the plaintiff that the defendant utilised his position as a shareholder of Genesis to commence a series of actions to interfere, impede and/or jeopardise the conversion of the Intan preference shares, the termination of the JVSA and as the agreement with Perisai; as a means of retaliation and in an attempt to derail the share sale with Perisai.

[28] My observation on PW1 is that he is an honest an trustworthy witness. Even DW1 in his evidence admits that PW1 is a trust worthy and someone who had always protected DW1's interest. DW1 admits to the very close relationship he had with PW1. DW1 corroborates PW1's reasoning why he did not see it necessary to reduce the Genesis trust agreement in writing due to the relationship of trust both of them had. The relationship was so close that PW1 used to give more than RM100,000 to DW1 on loan without any written agreement or collateral.

[29] Learned counsel for the plaintiff had listed down the various admissions made by DW1 in his evidence to having numerous discussions with PW1 on ways in which the plaintiff can expand its operations in Malaysia and among others included the injection of bumiputra interest into the group. DW1 also stressed that it was never intended for any structure to be used to breach any laws. DW1 admits that the discussions with PW1 also include the suggestion

A that DW1 be used by the plaintiff as the bumiputra interest in the group. DW1 admits that he did not pay for the shares allocated to him. DW1 admits that he did not have a say in the allocation of the shares in Genesis to him and that he accepted the corporate structure that was formulated by the plaintiff. DW1 admits that when he was given documents to execute, he checked them to B ensure that there was no risk on him personally (rather than to ensure that his interest as a shareholder is protected). DW1 agrees that he did not insist to be made a director of Genesis nor did he as the majority named shareholder nominate any directors. DW1 admits to be an 'Emas person' (*Orang Emas*) at the material time. Looking at these admissions I therefore agree with the C plaintiff that these admissions suggest that the defendant was indeed a nominee holding the shares on trust for the plaintiff.

[30] DW1 never objected to the corporate structure and the terms of the D JVSA. DW1 admits that the allocation of the Genesis shares, the JVSA was merely an internal transaction in the plaintiff's group of companies. DW1 confirms that the issue on bumiputra participation and the eventual Petronas license was mainly relating to Benchmark rather than Genesis. DW1 confirms and admits the contents of the e-mail at p 1398 of bundle B5, *Jilid* VI. DW1 E admits that because of his involvement in Genesis, the plaintiff and Ezra felt that DW1 was trustworthy and could assist further through Benchmark. DW1 admits to the fact that all finances for Benchmark was by the plaintiff. DW1 was angry and upset when the plaintiff suggested that a person from Perisai be made a shareholder in Benchmark. DW1 confirms and admits the contents of F the e-mail at p 283 of bundle B1, *Jilid* II. DW1 confirms that the negotiations with PE1 and plaintiff regarding Benchmark failed and that DW1 felt betrayed. DW1 admits that it was during this time that he requisitioned an EGM for Genesis to prevent the share sale to Perisai.

G **[31]** Looking at this evidence, I cannot agree more with the plaintiff that the defendant himself in evidence has alluded and demonstrated that he was never and neither was he intended to be the beneficial owner of the Genesis shares. He was at all material time holding the shares on trust for the benefit of the plaintiff. His actions and conduct is not consistent with the conduct of a person H who claims to have beneficial interest in the shares. The fact that he never insisted to be a director, never paid for anything with regards to the shareholder, signed all documents that were given to him without question and admitted not to have 'personal interest' in Genesis in the e-mail at p 1400 of bundle B5, *Jilid* V1 proves without doubt that he was holding the shares on I trust for the plaintiff.

[32] I agree with the plaintiff that the defendant has not in any way provided any explanation as to why the plaintiff would allocate the shares in Genesis to him and give him control and rights over vessels in Intan worth more than

US$80m, bearing in mind that DW1 was prior to that an employee of Bayu Emas, a company under the plaintiff's group. It simply does not make sense and it defies any commercial logic and offends equity for the defendant to allege that he is the beneficial owner of the Genesis trust shares.

[33] In *Chempro Technology (M) Sdn Bhd v Wee Eng Hock & 2 Ors* [2010] 1 LNS 1857, the plaintiff established that through a corporate funding scheme to purchase a property, the plaintiff utilised a dormant company called Equity Stream to which the first defendant there held the shares in his name. The court found and allowed the order to declare that the shares were held in trust for the plaintiff.

[34] The High Court also accepted that in any event it would be unconscionable to allow a person who did not pay for the shares to claim to be the beneficial owner and in such instance the court should in any event imply a constructive trust nonetheless. Justice Mohamad Ariff Md Yusof had said the following:

> In any event, it will be unconscionable, if the law were to allow the first defendant to be invested with ownership of the shares in his name, although he did not pay for them. In such a situation there can be room to imply a constructive trust in favour of the plaintiff, see eg, *Tay Choo Foo @ Tay Chiew Foo v Tengku Mohd Saad @ Tengku Arifaad bin Tengku Mansur & Ors (all acting administrators of the estate of Tunku Mansur bin Tunku Yaacob, deceased) and another appeal* [2009] 1 MLJ 289; [2009] 2 CLJ 363, which adopts the commentary in *Halsbury's Laws of England* on 'Nature of Constructive trust':
>
> > A constructive trust attaches by law to specific property which is neither expressly subject to any trust nor subject to a resulting trust but which is held by a person in circumstances where it would be inequitable to allow him to assert full beneficial ownership of the property (para 585).
>
> He added,
>
> > Thus on the law and the evidence, the plaintiff has proven its claim. The version of the facts raised by the first defendant is difficult to accept since he has not explained satisfactorily why anyone would want to offer full shares to him in a company which is now apparently worth RM7m in assets.

[35] In *ESPL (M) Sdn Bhd v Radio & General Engineering Sdn Bhd* [2005] 2 MLJ 422; [2004] 4 CLJ 674, the Court of Appeal held as follows:

> It is settled that no particular form of words are necessary to create an express trust.
>
> Having established that there was an intention here to create a trust, it is now necessary to see if the other two requirements, namely, certainty of subject matter and of objects are present on the facts. Unless all three certainties are present there cannot be a trust. See, *Knight v Knight* (1840) 49 ER 68.

[36] The *ESPL*'s case shows that a trust needs not be in writing. What needs to be established are three criteria ie certainty of intention, certainty of subject matter and certainty of object.

[37] I agree with the plaintiff that the intention is a matter of evidence and it can be established by way of inference. The trust does not need to be in writing. Based on the uncontroverted testimony of PW1 the trust was an oral trust created between PW1 in his capacity as a director of the plaintiff and the DW1. In so far as certainty of subject matter, there is no issue as the subject matter is the Genesis shares. In relation to the certainty of object of the trust is concerned, there is no dispute that it was to enable the plaintiff to expand and widen its presence and operations in Malaysia.

[38] Although the trust is not put into writing, as shown in *ESPL*'s case I do not see any reason why the trust cannot be done orally. As learned counsel for the plaintiff has correctly cited the case of *Wan Naimah v Wan Mohamad Nawawai* [1974] 1 MLJ 41 in which Suffian CJ in the Federal Court held that:

> The law is that a declaration of trust may be made quite informally, provided that the words used are clear and unequivocal. As was stated by Romilly MR in *Grant v Grant*, words declaring a trust 'need not be in writing … They must be clear, unequivocal and irrevocable, but it is not necessary to use any technical words, it is not necessary to say, 'I hold the property in trust for you', nor is it necessary to say, 'I hold the same for your separate use'. Any words that the donor means at the time he speaks, to divest himself of all beneficial interest in the property are, in my opinion, sufficient for the purpose of creating the trust. I think that it is also sufficient for the purpose of shewing that the trust has been created, if he afterwards states that he has so created the trust, though there was no witness except the done present at the time the trust was created'.

[39] Learned counsel for the plaintiff had also submitted that the defendant having not paid any consideration either for the Genesis shares or the capital call for the establishment of Intan or for the vessels that were injected into Intan, would be unjustly enriched. I agree with him that whenever there is clear implication or unjust enrichment, the court should imply a constructive trust to satisfy the demands of justice and good conscience. This was the decision in the Court of Appeal in the case of *Tay Choo Foo @ Tay Chiew Foo v Tengku Mohd Saad @ Tengku Arifaad bin Tengku Mansur & Ors (all acting administrators of the estate of Tunku Mansur bin Tunku Yaacob, deceased) and another appeal* [2009] 1 MLJ 289; [2009] 2 CLJ 363 where Mohd Ghazali Yusoff JCA (as he then was) said:

> A constructive trust is simply a relationship created by equity in the interest of conscience. According to *Snell's Equity*, (26th Ed), at p 201, a constructive trust is 'a trust which is imposed by equity in order to satisfy the demands of justice and good

conscience, without reference to any express or presumed intention of the parties'. In *The Law of Trusts* by JG Riddall (3rd Ed), at p 359 the learned author's views are as follows:

> The constructive trust is a remedial device that is employed to correct unjust enrichment. It has the effect of taking title to property from one person whose title unjustly enriches him, and transferring it to another who has been unjustly deprived of it …

On constructive trusts, *Halsbury's Laws of England*, (4th Ed), reissue, Vol 48 at pp 301–306 reads as follows:

> 585. Nature of constructive trust. A constructive trust attached by law to resulting trust but which is held by a person in circumstances where it would be inequitable to allow him to assert full beneficial ownership of the property. Such a person will often hold other property in a fiduciary capacity and it will be by virtue of his ownership of or dealings with that fiduciary property that he acquired the specific property subject to the constructive trust. A stranger who receives property in circumstances where he has to actual or constructive notice that it is trust property being transferred to him in breach of trust will, however, also be a constructive trustee of that property.
>
> A person who holds property on a constructive trust is a constructive trustee in respect of it. He cannot claim for himself any increase in value of the property or any profits earned by it. If he becomes bankrupt, the property is not available for his general creditors but for the beneficiaries in whose favour the constructive trust subsists.

In the instant appeals, we are of the view that there will be unjust enrichment if the defendants were allowed to keep the said shares. The learned judge was right imputing or imposing a constructive trust whereby the 1st defendant held the said shares on trust for the deceased's estate. Having regard to his conduct, and in not being able to prove his claim that the said shares were given gratuitously to him by the deceased and his conduct in transferring the 4 million shares to the 3rd defendant notwithstanding his undertaking given to the court, it would be inequitable to allow him to deny the deceased's estate of the said shares. The relevant principles of trust law have been laid down in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 by Lord Browne-Wilkinson at p 705; he said …:

> The deceased treated the first defendant as an acquaintance and a good friend. They have known each other for several years. The deceased seems to have trusted him. The first defendant has now conceded during the course of this appeal that he never paid for the said share. In view of his conduct it would be most inequitable for the first defendant to deny the deceased's estate of the said shares.

The learned judge, based on the evidence before him, found that the transfer of the said shares was not intended to operate as a gift. There was clearly no intention of a gift. The beneficial interest never left the deceased with the result that there was no

disposition of that interest in the said shares. Absence of writing does not preclude the deceased as transferor from asserting his entitlement in equity. It is unconscionable after the failure to make payment for the said shares for the 1st defendant to assert his rights as registered owner of the said shares. He failed to fulfill that condition. A failure of consideration occurred as there has been a failure of performance by the 1st defendant of his obligation under an arrangement which was initially binding. Under the circumstances the learned judge was correct by way of remedy to impose a constructive trust on the 1st defendant who knowingly retains property of which the deceased has been unjustly derived of.

[40] The defendant submits that the law on registration of ships in Malaysia is governed by the Malaysian Merchant Shipping Ordinance 1952 ('MSO') and that s 11(b)(iv) clearly provides that the shares held by the Malaysian in a company must be held FREE OF ANY TRUST OR OBLIGATION TO NON-MALAYSIANS. The defendant further submits that it is very clear that the law prohibits any shares being held on trust for the purpose of any ship registering in Malaysia. Bearing in mind, the defendant argues, the plaintiff's witnesses had all testified that the structure was to be legitimate, and the plaintiff had even sought legal advice from Malaysian solicitors for a structure whose main objective and intent was for the registration of ships in Malaysia. Coupled with the fact that the defendant also adamantly insisted that he had never agreed to anything illegal, and that everything was above board and transparent, therefore, the only reasonable conclusion that could be gathered from the facts was that it was never the intention of the parties to set up a trust. Thus, the defendant concludes there was never a trust. The plaintiff according to the defendant, had clearly made it clear that their structure was not to offend local rules and regulations, that is was legitimate and that legal advice from Malaysian solicitors was sought, and since no shares for any company owning Malaysian-flagged vessels could be held on trust, therefore, it has always been the intention of the parties that the defendant was the registered and beneficial owners of the shares and that it would not be held on trust. There was even a statutory declaration made to this effect. Also the defendant submits, on documentation alone, ie Form 32A, clearly there was no trust as the shares were registered under the defendant's name.

[41] The Court of Appeal in *Tay Choo Foo @ Tay Chiew Foo v Tengku Mohd Saad @ Tengku Arifaad bin Tengku Mansur & Ors (all acting administrators of the estate of Tunku Mansur bin Tunku Yaacob, deceased) and another appeal* [2009] 1 MLJ 289; [2009] 2 CLJ 363 held that a trust existed notwithstanding the fact the judge at para [59] of the judgment observed and accepted that the transfer forms were executed and lodged with the consideration of RM1.2m stated herein. Yet no money was paid for the consideration and the Court of Appeal affirmed that a trust existed. Therefore the fact that Form 32A was executed

and lodged in the instance, to my mind, does not mean that it becomes conclusive evidence of the payment for the shares as the defendant himself had admitted that no payment was made.

[42] The provision of the MSO does not negate the fact that the trust existed. Genesis on its own prior to the defendant was already majority owned by a Malaysian citizen. This was in compliance with the requirements under the MSO. In fact, the original shareholder, Goh Bee Chean, transferred 11 shares of her own shares to the defendant. Together with the 49 shares from the plaintiff made up the 60 shares (60%) held by the defendant. Neither the defendant nor the plaintiff had the intention to break any laws or circumvent any regulations with the trust arrangement because everyone knew that the defendant was not required to comply with the MSO requirements for the vessels to be Malaysian flagged. Evidence shows that the defendant was brought in for commercial purposes rather than legal purposes, hence there is no issue of illegality and it is completely justified for the trust to exist. I agree with the plaintiff that had Genesis been a foreign owned entity prior to the defendant's involvement, then it may be argued that the purpose was to circumvent the MSO, here it is not the case. There is no evidence that shows that the trust was created with the intention to deceive the Marine Department of Malaysia.

[43] The defendant also tries to imply that the shares were given to the defendant as a gift. It is implied that because PW1 admitted on the stand that he was given the Ezra shares, hence the defendant could be in the same boat. The defendant failed to highlight the fact that in re-examination, PW1 explained that he was one of the founding members of the Ezra group of companies.

Hence, I agree with the plaintiff that the same cannot be said about the defendant who was merely an employee of the plaintiff.

[44] Further I agree with the plaintiff that the issue of 'gift' is an afterthought as it has not been pleaded.

CONCLUSION

[45] After hearing the evidence of witnesses and scrutinising submissions made by learned counsel from both parties, written as well as oral, on the balance of probability I agree with the plaintiff that those shares are being held on trust by the defendant for the benefit of the plaintiff. Hence, I allow the plaintiff's claim as prayed in the statement of claim and order those shares to be returned to the plaintiff within two weeks from today.

[46] Following this I also order the originating summons proceedings be dismissed.

[47] I also order the defendant to pay cost to the plaintiff.

Claim allowed.

Reported by Afiq Mohamad Noor